Supreme Court of Michigan.

DWIGHT MAY, ATTORNEY-GENERAL, ON RELATION OF COOK AND OTHERS *v.* THE CITY OF DETROIT AND OTHERS.

The Attorney-General has the right to enjoin in equity an abuse of a corporate franchise, as for instance, the payment of money by a municipal corporation on a contract made in disregard of its charter.

But to warrant his interference the abuse must be one of a substantial nature, and not one merely technical and unimportant. It should appear that the public has a substantial interest in the question; the right involved should be a public right, or at least not a private right merely; the wrong done or attempted, if it consist in a misuse or misappropriation of funds, should be either one involving questions of public policy, or, when that is not the case, the amount involved should be something more than merely nominal; something it is not beneath the dignity of the state to take notice of and protect by such a proceeding.

Where contracts for paving city streets are required by law to be let to the lowest bidder, the purpose is to secure such competition as the nature of the case will admit; and something is necessarily left to the discretion of the city council in determining what course will best accomplish that end.

It is not illegal under such a law to call for proposals for the putting down of the various kinds of wood and stone pavement, thus putting them in competition with each other; and then when the proposals are in, select for putting down the kind for which the most satisfactory bids, all things considered, are received.

But when the kind is thus selected the lowest bidder therefor has an absolute right to a contract.

Where, however, the Common Council awarded the contract to the highest of two bidders, but the difference in the bids was less than two hundred dollars, and less than thirty dollars of this was to be paid by the city, the rest being a charge upon lot-owners, and the contractors went on without objection and incurred large expenses, and the lot-owners did not complain, *Held*, that the amount involved was too insignificant to warrant the intervention of the Attorney-General, especially as there was no ground for charging the Common Council with intentional wrong, and the error, if any, was one of judgment only.

APPEAL from Wayne Circuit. Opinion by

COOLEY, J.—The right of the Attorney-General to proceed in equity to enjoin an abuse of corporate power consisting in the appropriation of corporate funds in a manner not justified by law, appears to me to rest on sound principles. The municipality and its citizens are not alone concerned in such an abuse. The corporate powers have been conferred by the state, with such restrictions and limitations as were thought important, some of which were imposed for the protection of the corporators against unjust and oppressive action of officials and others from considerations of general public policy. It can never be admitted that because

the corporation and its members in general, or even all of them, consent to or connive at the setting aside of these restrictions and limitations, the state, which deemed them important, shall not be at liberty to complain, for this would be to annihilate the just and necessary supremacy of the state, and to make the corporators sole judges of what franchises they should exercise and what powers the corporation should possess over them. It is the right of the state at all times to keep the grantees of its franchises within the limits prescribed in the grant; and public policy in general requires that serious departures shall not be overlooked, even though the parties injured by the particular act do not complain; for one abuse becomes precedent for another, and the Attorney-General does well to interfere when a municipality assumes to do injurious acts which the state in conferring the power to act at all, has expressly prohibited. It is conceded that he has the right to enjoin the misappropriation of a charitable fund held by the corporation; and had the fund in this case been held by the city as a donation for the pavement of its streets under the like conditions as to contracts to those prescribed by the charter, his authority to file the bill would be clear. But as between such a case and one where a fund has been raised by taxation for a like purpose, I do not perceive any such distinction as would create a difference in his right to intervene; and it would seem to be equally clear when the state has allowed the fund to be raised on certain conditions only, as where an individual has given a fund on the like conditions. Every misuse of corporate authority is in a legal sense an abuse of trust, and the state, as the visitor and supervisory authority and creator of the trust, is exercising no impertinent vigilance when it inquires into and seeks to check it. It must be conceded, I think, that this doctrine is not very fully settled by authority in this country, but this is perhaps because in very many cases individuals have been allowed to file bills when the question involved was one rather of public than of private concern; a practice which we are of opinion has been carried to an unwarranted extent, and which is much restricted in this state by the decision in *Miller* v. *Grandy*, 13 Mich. 540. But in England the right of the Attorney-General to file a bill in chancery in cases of this nature seems to be recognised; and without examining the cases in detail where the principle seems to me so plain, I refer to *Attorney-General* v. *Brown*,

1 Swanst. 265; 1 Younge & Col. 416; 2 Mac. & Gor. 225; 11 Hare 205; L. R. 3 Eq. Cas. 552; L. R. 10 Eq. Cas. 152, as cases which recognise more or less directly this doctrine. Nor can I concur in the argument of the City Counsellor that to support the suit, it must appear that the money involved is about to be appropriated to a purpose other than that for which it was raised. If there was no right to make the contract on which the money is proposed to be applied, it was an abuse of the corporate franchise to raise it at all; but when it has been received in the city treasury any application of it upon an unlawful contract is equally a misappropriation, whether such an application had previously been contemplated or not. It is the unwarranted use of the money that justifies the interference, and the pretence upon which it was raised is not important to the question of jurisdiction.

Where, however, the Attorney-General is to intervene in corporate affairs on behalf of the state the abuse should be one of a substantial nature, and not of a character merely technical and unimportant. It should appear that the public has a substantial interest in the question; the right involved should be a public right, or at least not a private right merely; the wrong done or attempted, if it consist solely in a misuse or misappropriation of funds, should be either one involving questions of public policy, or, when that is not the case, the amount involved should be something more than merely nominal; something that it is not beneath the dignity of the state to take notice of or protect by such proceeding. The remedy is somewhat extraordinary, and substantial grounds ought to appear to justify a resort to it. It becomes necessary, therefore, to consider whether any such substantial grounds support it in the present case.

The wrong complained of here is a disregard of the provisions of the city charter, which require contracts to be publicly let to the lowest responsible bidder. The facts appear to be that the Common Council, having determined to cause St. Aubin avenue to be paved, instead of determining in advance what particular kind of pavement should be put down and confining their invitation for proposals to that kind, caused specifications for each of several different kinds of wood and stone pavement to be prepared and filed with the Controller, and then advertised that sealed proposals would be received during a time specified for paving said avenue with either wood or stone pavement, accord-

ing to the specifications thus placed on file. It further appears that in response to this advertisement no fewer than fifty-seven proposals were received from different parties for the putting down of various kinds of wood and stone pavement, some of which were covered by patents, and others were open to be put down by any parties. The Detroit Ironizing and Paving Company submitted a proposal for putting down the Ballard patent pavement, with Medina curbstone, for $24,459.85, and Hillsendegen & Dunn proposed to do the same for $24,642.46. These were the only bids for that kind of pavement, but there were proposals for putting down other pavements at much smaller sums.

Hillsendegen & Dunn were the assignees of the Ballard patent, but the Ironizing and Paving Company tendered to the city ample indemnity against any liability to the owners of the patent in case their proposal should be accepted. They were justified by a previous resolution of the council in supposing that such security would be regarded as sufficient. The council, however, having determined to put down the Ballard pavement, rejected the bid of the Ironizing and Paving Company on the ground that they had no right to lay it and therefore were not responsible bidders within the meaning of the law, and accepted the bid of Hillsendegen & Dunn, the assignees of the patent, whose right was supposed to be clear. It is a payment of money upon the contract with these parties which it is proposed to enjoin in this suit.

The first question involved in the merits of the suit is whether the council was justified in proceeding in the manner mentioned to obtain proposals. It is insisted, on behalf of the Attorney-General, that the kind of pavement to be put down should first be determined, and that bids should be called for and competition invited for that kind alone. It is denied that wood pavement can be put in competition with stone pavement, or that two kinds of wood pavement essentially different in construction and cost, can be included in the same notice, which calls only for proposals for the paving of one street. The law, it is argued, intends that the bids shall settle the right to a contract on a mere inspection of the prices named; but if the bids are not to be all directed to the same specifications they settle nothing, and it will always be in the power of the council to reject the lowest bid on the pretence that it is for an inferior pavement, whether such is the truth or not, and to accept the bid of a party they desire to favor, on the

claim that, though his bid is higher, yet it is for a better pavement, and consequently such bid is, all things considered, the most for the interest of the city, and therefore to be deemed the lowest.

It is not to be denied that there is a good deal of truth in this argument; and if such a construction of the charter as the complainant contends for will put it out of the power of the council to practise favoritism in awarding contracts, it ought to be sustained as the one which the legislature must have intended. We are not aware, however, that it has ever been supposed that the provisions of the charter now in question would have that highly desirable effect; on the contrary, it has often been observed that the most severe and stringent regulations of this nature may be administered dishonestly, though according to the strict letter of the law, so as not only to fail to give the proposed protection to the public, but, on the other hand, so as to operate as if purposely devised to enable dishonest persons to plunder the public with impunity. The requirement that contracts shall be let to the lowest bidder is, in many cases, peculiarly susceptible of abuse. Its purpose is to secure competition among contractors for public works and supplies, and to give the public the benefit thereof. In some cases the most ample competition would be invited by presenting to bidders complete and particular specifications, which indicate the precise things wanted or which are to be done, and leave nothing to discretion or negotiation afterward. But this could only be true where the case was such that many persons could bid for the work or materials and would have a legal right to do the one and furnish the other, and when the materials were not monopolized in single hands, but were readily obtainable from several sources. If a patented article was desired which was owned by a single person who refused to sell the right to territory or to fix a royalty; or if stone or any other material were required, and a single person owned all within a practicable distance of the place where it is to be used, nothing could be more obvious than that proposals which confine bids to the particular article or material would invite no valuable competition, and that the protection of the public must lie in the power of the council to reject unreasonable offers. In such a case nothing is easier than for the council to obey strictly the letter of the law, and yet dishonestly and corruptly award a contract to one who is lowest bidder for no

other reason than because no one can bid against him, and who, having a practical monopoly, is allowed to fix his own terms.

Now, if the purpose of the council is to secure competition in work or supplies for the public, something is necessarily left to the discretion of the council, and they must determine in each case what competition the nature of the case will admit of, and what is the best method to secure it. If they invite proposals for a particular thing or process, they necessarily in so doing exclude everything else which might have been substituted for the thing called for; and there is no clearer field for corruption and favoritism than in shaping proposals if, in fact, the city is in corrupt hands.

The matter of paving affords an apt illustration of this truth. From the proposals before us it would be a reasonable inference that there are several patented wood pavements nearly equal in value and cost; but if the council call for proposals for one only, they necessarily exclude all the others; and I am aware of no legislation, and I can conceive of no process by which they can be compelled always to make the selection from public motives exclusively, if their disposition shall be to do otherwise.

It would be worse than idle for the law to mark out, or for the council to follow, any one unvarying course in these cases. The same course which, under some circumstances, would be manifestly proper and most for the public good, under others would be so plainly detrimental and place the public so completely at the mercy of interested parties, that it could not be adopted by a body having any liberty of choice without justly subjecting themselves to the charge of corruption. It must therefore be manifest that any inflexible rule which the law should lay down, and which should trust nothing to the integrity and nothing to the discretion of the council, must necessarily work mischief in many cases, and it would be productive of good, I think, in few cases, if any.

I do not doubt that it was competent for the council in this case to have confined the bids to what is called the Ballard pavement. But if this had been done it must be obvious that the best method would not have been adopted to invite competition or to obtain cheap pavements. Assuming that pavement to be protected by a valid patent, the assignees of the right were in position to fix their own terms in a contract or for the permission to lay it. But if another kind was of nearly equal value, competi-

tion might, perhaps, be had by putting the one against the other and inviting bids for both. The greater the number of such pavements the larger is the opening for competition. It is quite true that if, when the bids are in, the council may reject one kind on the ground of its being less valuable than another, it must follow that the bids are not conclusive upon the right to a contract; but that a right in the council to determine the kind is more likely to be exercised from dishonest motives after the bids are in than it would be in deciding what bids should be received, is not, to my mind, very apparent. On the contrary, the broader the door that is opened to competition, the greater will be the number of those who will be interested in watching the proceedings to see that just awards are made and impartial judgments pronounced. If there is danger of corrupt understandings and combinations when there are a score of bidders, the danger is proportionately increased when the door is closed against all but one or two. And when, as in this case, the owners of the patented process are not only invited to bid against each other, but are also put in competition with all who may offer to lay the kinds not patented, it is obvious that the council in their invitation for bids have done all that the nature of the case admitted of being done to secure competition for the public benefit. The proposals have had the spirit of the law in view, and I think are within the letter also.

If it is lawful to invite competition in this manner, it must also be lawful in passing upon the bids to have regard to the relative value of the kinds bid for, and the rejection of the kinds for which the bid is lowest is therefore not necessarily erroneous. But the rejection of the lowest bid for the particular kind fixed upon raises other questions.

When bids are thus called for, all bidders for a particular kind of pavement are bidders against all others, in a certain sense, but are also bidders against each other in a more particular sense. It would be the duty of the council, when all bids were in, to examine all, and to select the kind of pavement for which the bids, all things considered, were relatively the lowest. They might thus, perhaps, reject the kind they would have preferred in advance, but for which they find all bids exorbitant, and determine upon another, because, in their opinion, the offers made for it are more satisfactory. But when the kind is selected they have no discretion to be exercised in a choice between responsible bidders. The lowest has an absolute right to the contract.

In this case there were two bidders for the Ballard pavement, and the council awarded the contract to the highest. It is conceded that they did this on the sole ground that the lowest had no right to lay it, and consequently could not be considered a responsible bidder. Whatever security such a party might tender, it is said could not be adequate, because if he had not the right he might be enjoined in his attempt to put it down. And at best the city would only take upon itself the risk of long and expensive litigation by accepting such a bid, with indemnity, which might or might not after a time prove adequate.

Whether the council was justified in rejecting the lowest bid under the circumstances and upon the ground stated, is a question I do not think we are called upon, by this record, to discuss, and I shall express no opinion upon it. The company who were lowest bidders took no steps to compel the city to enter into a contract with them, but suffered the award to stand, and heavy expenditures have been made in reliance upon it. They may, therefore, fairly be held estopped from setting up any claim now, and their appearance in this case as relators is of no importance. The only considerations to be weighed are those of a public nature. There are no indications of a deliberate purpose on the part of the council to disobey the law and misuse their franchise, but if they have erred it has doubtless been through mistake in judgment. All the interest which the public can have in the matter must therefore be of a pecuniary character, and be measured by the difference between the two bids. The difference is less than 1-13th of 1 per cent. of the whole sum, and less than one-sixth of this falls upon the city, the remainder being payable by individual lot-owners. The lot-owners do not complain, and when the amount thus becomes an individual charge the party concerned may properly be allowed to waive legal objections and make payment if he sees fit. The fund to be considered is therefore only that portion of the difference between the bids which would fall upon the city at large, and which in this case would constitute the measure of the public wrong. But that sum is considerably below the sum named in the statute as the minimum of equitable jurisdiction. And I see no reason for permitting the Attorney-General to invoke the process of equity on public grounds, when the considerations are only pecuniary and involve less than $30, while $100 is essential to give jurisdiction in private suits.

The statute should apply by analogy, if it does not expressly. The dignity, or the interest, or the public policy of the state is not concerned to interfere for the correction of a mere error of judgment on the part of corporate authorities, where the injury is only pecuniary, and so far as it affects the public is so insignificant, and where the private parties who are chiefly concerned have seen fit to waive their objections, if they had any.

The result is, that a case of equitable jurisdiction is not to my mind presented, and the decree appealed from should be affirmed with costs against the relators.

CHRISTIANCY, C. J., announced his concurrence in this opinion, and COOLEY, J., stated that he was authorized by GRAVES, J., to say that he also concurred.

CAMPBELL, J.—Whether the attorney-general can interfere in such cases without some statute to determine the extent and conditions of such interference is a question on which I entertain some doubts, and I express no opinion upon it. I think it very clear that in this case he had no such right and no equity, and upon this I concur with the general views of my brother COOLEY.

I think the method of competition adopted by the council here was the best one which could be devised where patents are not held open to the use of all persons upon a fixed royalty, and I think they were fully justified in regarding no one as a responsible bidder who has no right to do the work, and could not do it without danger of being enjoined by the patentee. The object of the law is to secure that the work may be done without interruption, and not to invite litigation.

I think, therefore, that the action of the council was not illegal, and cannot be complained of.

Supreme Court of Pennsylvania.

THE CHARTIERS AND ROBINSON TOWNSHIP TURNPIKE ROAD COMPANY *v.* BUDGE.

The Acts of Congress requiring certain instruments of writing to be stamped before being used in evidence, apply to the use of such instruments in all courts, both state and national.

By the Acts of Congress, an instrument of writing not properly stamped is prohibited from being used as evidence, either in a state or a Federal court.